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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ARIZONA**  
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11 **SUNBURST MINERALS, LLC,**  
12 **Plaintiff/Counterdefendant,**  
13 **vs.**  
14 **EMERALD COPPER CORP.,**  
15 **Defendant/Counterclaimant.**  
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**3:15-cv-08274 JWS**  
**ORDER AND OPINION**  
**[Re: Motion at Docket 113]**

17 **I. MOTION PRESENTED**

18 At docket 113 plaintiff and counterdefendant Sunburst Minerals, LLC  
19 (“Sunburst”) moves for clarification of the court’s order and opinion at docket 112.  
20 Defendant and counterclaimant Emerald Copper Corp. (“Emerald”) responds at  
21 docket 122.

22 **II. BACKGROUND**

23 In November 2016 Emerald served its responses to Sunburst’s first set of  
24 interrogatories, requests for admission, and requests for production.<sup>1</sup> Emerald’s  
25 responses to interrogatories Nos. 1 and 2 identify each of Sunburst’s claims that  
26 Emerald believes to be invalid. In pertinent part, Emerald stated that it “understood”  
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<sup>1</sup>Doc. 52-6 at 78–94.

1 that Emerald No. 1 was not properly monumented.<sup>2</sup> Emerald did not mention Emerald  
2 No. 2.

3 At docket 52 Sunburst moved for summary judgment with respect to all of its mill  
4 sites and most of its claims.<sup>3</sup> In pertinent part, Sunburst asserted that Emerald lacks  
5 any evidence supporting its understanding that Emerald No. 1 was not properly  
6 monumented.<sup>4</sup> Sunburst also noted Emerald's failure to even identify Emerald No. 2 as  
7 a potentially invalid claim.<sup>5</sup>

8 Emerald opposed Sunburst's motion at docket 70, raising a number of  
9 arguments regarding certain claims and mill sites. This included Emerald's argument  
10 that certain claims were abandoned because they were not properly monumented in  
11 accordance with A.R.S. § 27-203(A)(2). Relying on the affidavits of Kenneth E. Schaaf  
12 ("Schaaf"), Brian Dirk Hatter ("Hatter"), Donald T. Scoretz ("Scoretz"), Howard Metzler  
13 ("Metzler"), and Liao David Hutzinger ("Hutzinger"), Emerald argued that there is a  
14 genuine dispute as to: (1) whether Sunburst's predecessor El Paso Natural Gas ("El  
15 Paso") failed to re-stake the Mineral Survey Claims<sup>6</sup> after it abandoned its patent  
16 application;<sup>7</sup> and (2) whether Sunburst's predecessor, St. Genevieve Resources  
17 ("SGR"), failed to monument the 20 new claims it located in 2004.<sup>8</sup> Emerald did not  
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20 <sup>2</sup>*Id.* at 82–83.

21 <sup>3</sup>All claims except for Emerald 2B, Emerald 3A, Emerald 4A, Emerald 40, and  
22 Emerald 41.

23 <sup>4</sup>Doc. 52 at 8.

24 <sup>5</sup>*Id.*

25 <sup>6</sup>Copper Hill No. 2; Hermes; Hermes No. 2; Jimtown Copper No. 1; Valley Copper No. 1;  
26 Valley Copper No. 2; and Valley Copper No. 3.

27 <sup>7</sup>Doc. 70 at 4; doc. 71 at 6 ¶ 17.

28 <sup>8</sup>Doc. 70 at 4–5; doc. 70 at 6–7 ¶¶ 22–24.

1 argue that either Emerald No. 1 or Emerald No. 2, which were staked in 1996, were  
2 abandoned for lack of proper monumenting.

3 At docket 112 the court granted Sunburst's motion in part and denied it in part.  
4 The court held that Sunburst and its predecessors in interest were generally under no  
5 obligation to re-stake monuments that were properly staked within 90 days from the  
6 date of location.<sup>9</sup> Applying this principal to the facts of the case, the court found that  
7 Emerald's witnesses' failure in 2012 and 2015 to find monuments placed on the Mineral  
8 Survey Claims, which were located between 40 and 105 years earlier, did not raise a  
9 genuine issue of material fact.<sup>10</sup>

10 Despite Emerald's failure to specifically address Emerald No. 1 and Emerald  
11 No. 2, the court omitted those two claims from the list of claims for which summary  
12 judgment was granted in Sunburst's favor.<sup>11</sup> Sunburst now moves for clarification  
13 whether the court inadvertently omitted those claims.

### 14 **III. DISCUSSION**

15 Emerald asserts that it did raise arguments that Emerald Nos. 1 and 2 were not  
16 properly monumented in its opposition. In support of this assertion, Emerald points not  
17 to its opposition, however, but rather to the Schaaf, Hatter, Scoretz, Metzler, and  
18 Hutzinger affidavits, generally,<sup>12</sup> and to Huntzinger's statement the only monument he  
19 recognized on site was associated with the FDR claim, specifically.<sup>13</sup> This evidence,  
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23 <sup>9</sup>Doc. 112 at 12–14.

24 <sup>10</sup>*Id.* at 14.

25 <sup>11</sup>*Id.* at 20.

26 <sup>12</sup>Doc. 122 at 1–2.

27 <sup>13</sup>Doc. 71-1 at 19 ¶ 8.

1 Emerald argues, raises questions of material fact regarding whether any monuments  
2 were ever placed on Emerald No. 1 or Emerald No. 2.<sup>14</sup>

3 Emerald waived any arguments with regard to inadequate monumenting on  
4 Emerald Nos. 1 and 2 by not specifically raising them in its opposition.<sup>15</sup> And even if  
5 they had not been waived, they would fail because they are not supported by sufficient  
6 evidence. The location notices for Emerald Nos. 1 and 2 state that TSC Enterprises,  
7 Inc. placed monuments on those claims in 1996 when they were located.<sup>16</sup> Emerald  
8 lacks any contemporaneous evidence disputing these statements. Huntzinger's  
9 testimony that he did not observe monuments at some point in 2004 is insufficient to  
10 raise a genuine dispute.<sup>17</sup>

#### 11 **IV. CONCLUSION**

12 For the reasons above, the motion at docket 113 is granted. The court clarifies  
13 its order and opinion at docket 112 as follows: Sunburst is also entitled to judgment in  
14 its favor as to both counts of its complaint and both counts of Emerald's counter-  
15 complaint with regard to Emerald No. 1 and Emerald No. 2.

16 DATED this 25<sup>th</sup> day of October 2017.

17  
18 /s/ JOHN W. SEDWICK  
19 SENIOR JUDGE, UNITED STATES DISTRICT COURT  
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24 <sup>14</sup>Doc. 122 at 2.

25 <sup>15</sup>See *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (“[The nonmoving party’s]  
26 burden to respond is really an opportunity to assist the court in understanding the facts. But if  
27 the nonmoving party fails to discharge that burden—for example, by remaining silent—its  
opportunity is waived and its case wagered.”) (quoting *Guarino v. Brookfield Township*  
*Trustees*, 980 F.2d 399, 405 (6th Cir. 1992)).

28 <sup>16</sup>Doc. 52-2 at 70–73.

<sup>17</sup>See *Temescal Oil Mining & Dev. Co. v. Salcido*, 69 P. 1010, 1011 (Cal. 1902).